



**NORTHWEST ENVIRONMENTAL DEFENSE CENTER**  
10015 S.W. Terwilliger Blvd., Portland, Oregon 97219  
Phone: (503) 768-6673 Fax: (503) 768-6671  
[www.nedc.org](http://www.nedc.org)

November 4, 2014

## **FREEDOM OF INFORMATION ACT REQUEST**

*Submitted via email FOIA online*

**RE: Freedom of Information Act Request for Information Concerning the  
National Pollutant Discharge Elimination System Permit for the Columbia  
Generating Station, No. WA0025151**

Dear FOIA Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, the Northwest Environmental Defense Center (NEDC) requests copies of public records in the custody of the U.S. Environmental Protection Agency (EPA), identified below.

NEDC is a nonprofit environmental organization with its principal place of business in Portland, Oregon. It is an independent organization that was established by a group of professors, law students and attorney alumni at Lewis and Clark Law School in 1969. NEDC is comprised of citizens, attorneys, law students and scientists. NEDC's mission is to protect the environment and natural resources of the Pacific Northwest by providing legal support to individuals and grassroots organizations with environmental concerns, and by engaging in education, advocacy and litigation independently and in conjunction with other environmental groups.

### **Background**

On February 3, 2014, Washington's Energy Facility Site Evaluation Council (EFSEC) posted notice of its tentative determination to reissue the National Pollutant Discharge Elimination System (NPDES) permit to Energy Northwest for discharges from the Columbia Generating Station nuclear power plant, Permit No. WA0025151. The Columbia Generating Station both discharges to the Columbia River and removes water from the Columbia River, through cooling water intake structures that are covered by screens. Prior to issuing the public notice for the permit reissuance, EFSEC had been involved in discussions with EPA and the National Marine Fisheries Service (NMFS) regarding the permit's terms.

NMFS submitted comments to EPA Region 10 on February 20, 2014, requesting that EPA formally object to the issuance of the NPDES permit based on NMFS's

determination that EFSEC's proposed permit, and specifically the cooling water intake screen design, would have more than a minor detrimental effect on Federally-protected species. NMFS then submitted comments to EFSEC on February 28, 2014, stating its concerns that the existing cooling water intake screening system posed an unacceptable risk to juvenile salmon and steelhead that may encounter them. On May 5, 2014, EPA submitted comments to EFSEC stating that despite additional information provided by EFSEC, the draft NPDES permit failed to address EPA's concerns related to cooling water intake structures under section 316(b) of the Clean Water Act.

On August 20, 2014 EFSEC sent a letter to EPA with the final proposed permit for EPA review. EFSEC's letter states that "[s]ince the May 5<sup>th</sup> letter, EFSEC and EPA have worked collaboratively to respond to comments and craft a final proposed permit that satisfies all applicable requirements." EPA responded on September 11, 2014 in a letter to EFSEC stating that "EPA reviewed the final proposed permit, fact sheet, and response to comments and decided to take no action on the proposed final permit." On September 30, 2014 EFSEC issued the final NPDES permit for the Columbia Generating Station.

NEDC is seeking information about the communications by and between NMFS, EPA, and EFSEC during the permit re-issuance process.

### **Requested Records**

NEDC respectfully requests a copy of the Memorandum of Agreement regarding operation of the NPDES permit program between EFSEC, the State of Washington, and EPA, dated August 1979, and including any subsequent amendments.

NEDC also requests copies of any and all records and communications by and between EPA, NMFS and/or EFSEC since January 1, 2013, relating to the development and ultimate issuance of the NPDES permit for the Columbia Generating Station, NPDES permit No. WA0025151. This includes any correspondence between EPA and NMFS, and between EPA and EFSEC.

This request applies to all such records in whatever form, including (without limit) correspondence, memoranda, notes, telephone conversation notes, e-mail messages and electronic files, the release of which is not expressly prohibited by law. It also covers any non-identical duplicates of records that, by reason of notation, attachment, or other alteration or supplement, include any information not contained in the original record. This request is not meant to be exclusive of other records that, though not specifically requested, would have a reasonable relationship to the subject matter of this request. To save resources and mailing expense, we request electronic copies of these documents if available.

### **Exempted and nonexistent documents**

Please include in your response an explanation of which documents, if any, may

be privileged or exempt from this FOIA request and why. 40 C.F.R. § 2.104(f). If you should seek to prevent disclosure of any of the requested records, please justify your refusal by referring to the specific exemption that you are invoking under the FOIA. *Id.* § 2.104(h)(2). Also, please provide those portions of the documents with information request that are not specifically exempted from disclosure. If the documents do not exist, please indicate that in your written response. We reserve the right to appeal any denial. *Id.* § 2.104(j).

### **Request for Fee Waiver**

NEDC requests that you waive all fees in connection with this request. FOIA carries a presumption of disclosure and the fee waiver was designed specifically to allow nonprofit public interest groups, such as NEDC, access to government documents without the payment of fees. The courts have stated that the statute “is to be liberally construed *in favor of waivers* for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 Cong. Rec. S14298 (Sept. 30, 1986) (Sen. Leahy)) (emphasis added). *See also Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003). As shown below, NEDC meets FOIA’s two-pronged test for a fee waiver because disclosure of the requested documents is both in the public interest and not primarily in the commercial interest of NEDC. 5 U.S.C. § 552(a)(4)(A)(iii). *See also* 40 C.F.R. § 2.107(l).

**I. Disclosure of this information is in the public interest because it will significantly contribute to public understanding of the operations or activities of the government.**

NEDC qualifies for a fee waiver because the requested information is likely to significantly contribute to the public understanding of government operations or activities. Under the FOIA the fee associated with the document production is waived if the release of the information is in the “public interest.” 5 U.S.C. § 552(a)(4)(A)(iii) (“documents shall be furnished without any charge . . . if disclosure of the information is in the public interest”). Pursuant to EPA’s implementing regulations at 40 C.F.R. § 2.107(l)(1)(c), EPA must consider whether (1) the subject of the request concerns the operations or activities of the government; (2) disclosure is “likely to contribute” to an understanding of government operations or activities; (3) disclosure will contribute to public understanding of a reasonably broad audience of persons interested in the subject; and (4) the resulting contribution to public understanding of government operations or activities is likely to be significant. Because disclosure of the information NEDC requests herein meets these four factors, disclosure is in the public interest and NEDC should be granted a fee waiver.

**A. The subject of NEDC’s request directly and clearly concerns “the operations or activities of the government.”**

NEDC’s request concerns the operations and activities of the government. 40 C.F.R. § 2.107(l)(2)(i). The requested documents relate to EPA’s communications and

recommendations regarding the proper application of the Clean Water Act, and in particular the measures that EPA and NMFS determined to be necessary to protect species listed under the Endangered Species Act (ESA). Such communications are precisely the type of operation or activity contemplated by the FOIA fee waiver provision. *See, e.g., Natural Res. Defense Council v. E.P.A.*, 581 F. Supp. 2d 491 (S.D.N.Y. 2008) (granting a fee waiver for a request for EPA's records recommending the use of a pesticide for potatoes closer to harvesting time than currently allowed).

The documents NEDC seeks likely contain specific questions, suggestions, instructions or interpretations by EPA to and/ or between NMFS and EFSEC regarding the application of the Clean Water Act in the context of permitting the nuclear power plant. As EPA is the expert Federal agency charged with oversight and ensuring proper implementation of the Clean Water Act, any information pertaining to EPA's involvement with the NPDES permit issued to the Columbia Generating Station is presumed to be held by EPA. Such information regarding EPA's decisionmaking and interpretations constitutes operations or activities of the government.

**B. Disclosure of the requested information is "likely to contribute" to an understanding of government operations or activities.**

The information requested by NEDC is likely to contribute to an understanding of government operations and activities. 40 C.F.R. § 2.107(l)(2)(ii). To the best of NEDC's knowledge, the requested information is not already in the public domain. The information contained in the requested documents will provide an otherwise unavailable window regarding EPA's determination of whether the permit provisions, and in particular the design of the cooling water intake structures at the Columbia Generating Station, comply with the requirements of the Clean Water Act.

Moreover, this information will allow the public the opportunity to review EPA's determinations as to whether other permit provisions or updated screen designs might provide necessary protections, and therefore whether the final Clean Water Act permit that EFSEC issued is sufficient. The information will also provide a basis for public understanding of how the Clean Water Act permitting process overlaps with ESA consultation requirements in this context. Such information is critical for the public to be assured that the Clean Water Act is being implemented as Congress intended. Thus the requested communications and determinations regarding the adequacy of the provisions in the Columbia Generating Station's NPDES permit will be "meaningfully informative" about EPA's operations and activities.

**C. Disclosure of the information requested by NEDC will contribute to public understanding of the subject.**

The requested information will contribute to public understanding of the subject. Information that could "support oversight of [an agency's] operations" is the type of information that Congress considered to have a "high potential for contribution to public understanding." *McClellan Ecological*, 835 F.2d at 1286. In furtherance of its mission

to protect the environment and natural resources of the Pacific Northwest through education, advocacy, and litigation, NEDC has an interest in ensuring protection of water quality and the habitat of threatened or endangered species in Eastern Washington. This includes ensuring protection of water quality in the Columbia River and the listed species that depend on the river. NEDC intends to analyze the documents provided to ensure that the Columbia Generating Station and its recently issued NPDES permit comply with the Clean Water Act.

After reviewing the information provided, NEDC intends to use its resources and expertise to inform and educate volunteers, members and supporters about the interactions regarding authorizations and renewals for the Columbia Generating Station. NEDC is comprised of professionals with scientific and legal expertise who regularly write, speak, and teach on environmental compliance and other issues regarding environmental quality in the Pacific Northwest. NEDC is uniquely qualified to disseminate the requested information to a "reasonably broad audience of persons interested in the subject." 40 C.F.R. § 2.107(l)(2)(iii). NEDC, long known for its leadership role in ensuring agency compliance with federal law, uses a combination of education, research, and advocacy to inform the public on how government actions impact Washington's precious natural resources. NEDC will draw on its expertise and existing connections to the community in Eastern Washington and throughout the Pacific Northwest to disseminate this information.

The information will be disseminated to the public through our website ([www.nedc.org](http://www.nedc.org)), social media, electronic news bulletins, newsletter, and other publications, all of which are available free of charge to interested parties. *See Carney v. U.S. Dept. of Justice*, 19 F.3d 807, 814 (2d. Cir. 1994) (observing that the relevant inquiry is "whether [the] requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject"). *See also Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005) (finding requester's publication of online newsletter and intent to create website using requested records, among other things, sufficient for dissemination purposes). By analyzing the requested information and then disseminating the results among NEDC's hundreds of members, as well as sharing the information with other nonprofit organizations including Columbia Riverkeeper and Northwest Environmental Advocates, "disclosure of the requested information will contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester." 40 C.F.R. § 2.107(l)(2)(iii). Hence EPA's disclosure of the information requested by NEDC will contribute to public understanding of the subject.

**D. The disclosure will contribute "significantly" to public understanding of government operations or activities.**

Disclosure of records pertaining to communications by and between EPA, NMFS and EFSEC is likely to "significantly" contribute to public understanding of EPA's operations and activities in Washington. *Id.* § 2.107(l)(2)(iv). The disclosure of EPA's communications and determinations as to whether the NPDES permit provisions,

including the design of the cooling water intake structures, comply with the requirements of the Clean Water Act and the extent to which EPA coordinated its responses to EFSEC with NMFS will contribute to public knowledge that did not exist pre-disclosure. Many of these communications occurred after the close of the public notice and comment period, and are not part of the public record.

NEDC's subsequent analysis and dissemination of this information to the public will increase public understanding to a significant extent. *See Ctr. For Biological Diversity v. OMB*, 546 F. Supp. 2d 722, 731 (N.D.Cal. 2008) (granting a fee waiver because "[m]ere knowledge of the weight [the OMB placed upon greenhouse gas emissions when it conducted its analysis] will significantly increase the public's understanding"). NEDC has a consistent record of significantly increasing public understanding of the effects of federal agency action on protecting the environment. The requested information will also significantly inform the public about ongoing discussions between EPA, NMFS and EFSEC regarding the application of federal law to the Columbia Generating Station.

## **II. NEDC has no commercial interest in the requested information.**

The second element of the fee waiver analysis addresses the requester's "commercial interest" in the information. To determine if the request is made primarily for the commercial benefit of the requester, EPA's regulations examine two relevant factors. 40 C.F.R. § 2.107(l)(3).

The first factor considered is "whether the requester has a commercial interest that would be furthered by the requested disclosure." *Id.* § 2.107(l)(3)(i). As a 501(c)(3) nonprofit, NEDC has no commercial, trade or profit interest in the material requested. NEDC will not be paid for, or receive other commercial benefits from the publication or dissemination of the material requested. Therefore, NEDC does not seek this information for any use that furthers a commercial interest.

The second factor hinges on "the primary interest in the disclosure." *Id.* § *Id.* § 2.107(l)(3)(ii). The identified commercial interest cannot be significantly more substantial than the public interest. *Id.* There is great public interest in the release of the materials sought because they will provide previously unavailable information regarding EPA's interpretations of whether the NPDES permit provisions afford the protections required by and are consistent with the Clean Water Act, and the extent to which EPA coordinated its responses to EFSEC with NMFS.

Thus, assuming *arguendo*, that NEDC has some "commercial" interest in the documents requested, a complete fee waiver would still be appropriate because NEDC's primary interest in the material is to inform the public about the operations and activities of EPA that affect the environmental quality in Eastern Washington. Therefore, the disclosure of the information is not "primarily in the commercial interest of" NEDC, and a fee waiver is appropriate.

### **Conclusion**

As provided by FOIA, 5 U.S.C. § 552(a)(6)(A)(i), and EPA's own regulations, 40 C.F.R. § 2.104(a), I trust that I shall receive a reply to this request within twenty business days of receipt. Thank you for your time and attention in this matter, and I look forward to hearing from you shortly. If you have any questions, feel free to contact NEDC at (503) 768-6726.

Sincerely,

A handwritten signature in black ink, appearing to read "Marla Nelson", written in a cursive style.

Marla Nelson  
Staff Attorney